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UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

In re:	Case No. 09-25849-B-13
JUN VILLANUEVA and RUCCELL VILLANUEVA,	
Debtor(s).	Adversary No. 10-2045-B
JUN VILLANUEVA, et al.,	DCN N/A
Plaintiff(s),	
vs.	Date: November 18, 2010 Time: 11:30 a.m.
MORTGAGE ELECTRONIC SYSTEM, INC., et al.,	Place: U.S. Courthouse Courtroom 32 501 I Street Sacramento, CA 95814
Defendant(s).	

MEMORANDUM DECISION ON MOTION FOR JUDGMENT ON THE PLEADINGS

This matter came on for final hearing on November 18, 2011, at 11:30 a.m. Appearances are noted on the record. At the conclusion of the hearing the court took the matter under submission. The following constitutes the court's findings of fact and conclusions of law, pursuant to Federal Rule of Bankruptcy Procedure 7052.

DECISION

The motion is granted in part and denied in part to the extent set forth herein. The motion's request for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) is denied as to all claims for relief. The motion's requests, pursuant to Fed. R. Civ. P. 12(h)(2) and (b)(6), for dismissal of the first,

second, fourth and fifth claims for relief contained in the first amended complaint filed on June 30, 2010 (Dkt. 30)(the "FAC"), are granted as to moving defendants Mortgage Electronic System, Inc. ("MERS"), IMB HoldCo, LLC ("IMB HoldCo"), IMB Management Holdings, LLP ("IMB Management"), OneWest Bank Group, LLC ("OneWest Group") and OneWest Venture, LLC ("OneWest Venture"), and those claims are dismissed as to defendants MERS, IMB HoldCo, IMB Management, OneWest Group and OneWest Venture without leave to amend. The motion's requests, pursuant to Fed. R. Civ. P. 12(h)(2) and (b)(6), for dismissal of the first, second, fourth and fifth claims for relief as to moving defendant OneWest Bank, FSB ("OneWest Bank") are granted as to defendant OneWest Bank with leave to amend. The motion's request for dismissal of the third claim for relief as to defendants MERS, IMB HoldCo, IMB Management, OneWest Group, OneWest Venture and OneWest Bank (collectively, the "Moving Defendants") is granted as to Moving Defendants without leave to amend. On or before August 12, 2011 the plaintiffs shall file a second amended complaint that is consistent with this ruling. If the plaintiffs wish to include in the complaint claims for relief against any or all of MERS, IMBHoldCo, IMB Management, OneWest Group and OneWest Venture, the plaintiffs shall file a motion requesting permission to include those defendants in the second amended complaint, shall file and serve said motion on or before August 5, 2011, and shall set said motion on the first available calendar which provides proper notice to parties in interest. If filed, the motion to amend

shall set forth the specific factual allegations which the plaintiffs would include in the second amended complaint as to those parties which the plaintiffs seek to include as named defendants. If filed, the motion to amend will also toll the August 12, 2011 deadline for filing the second amended complaint set forth above pending the resolution of the hearing on the motion to amend.

FACTUAL BACKGROUND

By this motion, Moving Defendants move for judgment on the pleadings under Fed. R. Civ. P. 12(c), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7012.

The FAC alleges five causes of action for 1.) Declaratory Relief, 2.) Violation of 11 U.S.C. § 362(a), 3.) Violation of 11 U.S.C. § 362(k)(1), 4.) Violation of the Real Estate Settlement Procedures Act ("RESPA"), and 5.) Civil Conspiracy.

The FAC grounds its claims for relief on the following alleged facts. The plaintiff debtors Jun and Ruccell Villanueva (the "Debtors") own real property located at 6608 Salvaterra Circle, Elk Grove, California (the "Property"). The Property is the Debtors' personal residence. On March 10, 2006, the Debtors executed an adjustable rate promissory note (the "Note") payable to the order of Pro30 Funding, Inc. ("Pro30") for the purpose of obtaining a loan. The Debtors executed a deed of trust (the "Deed of Trust") encumbering the Property to secure the Note. The terms of the Note required monthly payments over thirty years based on payment options including a payment comprised only of

accrued interest, a payment comprised of fully amortized principal and interest, or a payment comprised of amortized principal and interest over a fifteen-year term. The Debtors allege that the Note and Deed of Trust "did not specifically include either property taxes nor [sic] property insurance by escrow." FAC, ¶ 30.

The FAC alleges that Pro30 is no longer in business, but at the time the loan was made it allegedly "specified service of the loan" by MERS. Although not specifically alleged, the FAC strongly implies that The Note and Deed of Trust were later assigned to IndyMac Bank, FSB ("IndyMac"). IndyMac was subsequently closed by the Federal Deposit Insurance Corporation and a new entity, IndyMac Federal Bank, FSB ("IndyMac Federal"), a "bridge bank," was formed to which the assets of IndyMac, including the Note and Deed of Trust, were transferred. The Note and Deed of Trust, along with other assets of IndyMac were then allegedly "passed through" IMB HoldCo, IMB Management, OneWest Venture and OneWest Group to OneWest Bank.

The Debtors commenced a chapter 13 bankruptcy case (the "Bankruptcy Case") on March 31, 2009. The Debtors allege that "Defendant, as a matter of normal business practice, conducts an 'Escrow Analysis' pursuant to RESPA upon notice of a bankruptcy filing." FAC, ¶ 47. An escrow analysis allegedly analyzes the advances made by the lender in the twelve months prior to the bankruptcy filing for the purposes of paying of property taxes, insurance and other costs related to the security for a loan and

projects those costs into the future in order to determine the amount that the borrower will be required to pay for those costs in the future. The escrow analysis also allegedly compares the amounts advanced by the lender for these costs to the amounts paid into an escrow account by the borrower for payment of those costs; if the result shows that the lender has advanced funds in excess of what the borrower has paid into the escrow account, the lender will generate a notice of a post-petition increase in the regular monthly mortgage payment. The increase is allegedly intended to recoup the advances paid by the lender in excess of the payments made by the borrower to the escrow account. The notices specifying the post-petition increases in payments are sent to the debtor borrower and the chapter 13 trustee.

The Debtors allege that as a result of receiving a notice of a post-petition payment increase, the chapter 13 trustee takes action which results in the collection by the trustee of the increased payment as specified in the lender's notice, which action includes objections to confirmation or motions to dismiss if the debtor is not proposing to pay the full amount of the increased payment. The Debtors allege that in generating and sending the notices based on post-petition escrow analyses as described above, the "Defendants" fail to distinguish between pre- and post-petition escrow advances and improperly collect on a claim for a pre-petition debt through the ongoing monthly mortgage payment. The Debtors allege that this practice violates the automatic stay of 11 U.S.C. § 362(a).

In this case, the Debtors allege that named defendant IndyMac Federal Bank, FSB ("IndyMac Federal") generated an escrow account disclosure statement on "November 14, 2009," which statement reflected a pre-petition increase in the Debtors' monthly payment to a total payment amount of $3,388.34, comprised of $1,781.15 in principal, and interest, $514.06 for escrow items and $1,093.13 included for the purpose of recovering an escrow shortage.[1] The debtors also allege that on April 29, 2009 "Defendants" provided the debtors and the chapter 13 trustee with a notice under RESPA showing a new total payment of $2,782.68, effective as of April 2009.

The debtors allege that OneWest Bank filed a secured claim (the "Claim") in the Bankruptcy Case on or about May 8, 2009 "on behalf of IndyMac Bank, FSB's [sic] its assignees and/or successors in interest." FAC, ¶ 34. The Claim is filed in the amount of $551,752.65. The Claim includes a claim for pre-petition arrears in the amount of $29,204.40. The claim for pre-petition arrears include five "regular monthly payments" in the amount of $1,781.15 for the months of August, 2008 to December, 2008, three "regular monthly payments" for the months of January 2009 through March 2009 in the amount of $3,388.34, and $8,810.09 for "escrow advance."

On May 27 2009, "Defendants," on behalf of "OneWest Bank,

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[1]The allegation that the "pre-petition" escrow account disclosure statement was generated on November 14, 2009 is internally inconsistent, since the debtors filed their bankruptcy petition on March 31, 2009.

FSB, fka IndyMac Federal Bank, FSB, its assignees and/or successors" allegedly objected the Debtors' motion to confirm their chapter 13 plan filed on April 13, 2009.

On June 10, 2009, IndyMac Mortgage Services, allegedly a division of OneWest Bank, responded to a qualified written request made by the Debtors with a Customer Account Activity Statement that showed that the Debtors' mortgage payment was $1,781.15, and the escrow account balance was $13,631.66. On or about June 16, 2009, the chapter 13 trustee objected to confirmation of the Debtors' chapter 13 plan "based on feasibility." Confirmation of the plan was denied on September 18, 2009.

The debtors also allege that on or about September 14, 2009 "Defendants" admitted that the escrow advance of $8,810.09 listed in the Claim was attributable to an escrow shortage balance of $7,267.94 and a pre-petition tax balance of $1,542.15, and that the Debtors' post-petition payment should be $1,781.15, consisting of principal and interest. The Debtors subsequently confirmed a chapter 13 plan on December 9, 2009.

The Debtors also allege that the Defendants' violated RESPA by (1) failing to notify the Debtors when the note and deed of trust were transferred; (2) assessing more "risk" in the Defendants' escrow analysis calculations than is allowed by RESPA; (3) improperly accessing the escrow account for payment of property taxes and insurance; (4) failing to credit back charges improperly force-placing insurance when the Debtors had paid for

insurance themselves; and (5) performing an improper escrow analysis that resulted in incorrect notices of increase in payments. The Debtors specifically cite 12 U.S.C. § 2604 as the basis for their claims for RESPA violations.

Finally, the Debtors allege that the "Defendants," were engaged in a civil conspiracy for the purpose of "recouping pre-petition claims from post-petition estate property resulting in systematic injury to debtor" by means of the allegedly improper escrow analyses described above, concealing the post-petition collection of pre-petition claims, and objecting to confirmation of chapter 13 plans based on the improper escrow analyses.

In addition to the facts alleged by the Debtors in the FAC summarized above, the court takes judicial notice of the Escrow Account Disclosure Statement generated by IndyMac Federal dated April 23, 2009 (the "Statement")(Dkt. 58 at 2) and the Deed of Trust dated March 10, 2006 (Dkt. 56 at 2), a copies of which was submitted by the Moving Defendants with this motion. In the Ninth Circuit, a court may consider a writing referenced in a complaint but not explicitly incorporated therein if the complaint relies on the document and its authenticity is unquestioned. Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir.1998), superseded by statute on other grounds as stated in Abrego v. Dow Chem. Co., 443 F.3d 676 (9th Cir.2006); see also Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir.2001). In this case, both the Escrow Account Disclosure Statement and the Deed of Trust are referenced in the FAC but are not explicitly

incorporated therein. The Debtors do not question the authenticity of either document.

Having taken judicial notice of the Deed of Trust, the court notes, contrary to the Debtors' allegations in the FAC, that the Deed of Trust does provide as part of its uniform covenants that the Debtors shall pay the lender periodic payments of amounts due for taxes, assessements, items that can attain priority over the Deed of Trust as a lien or encumbrance on the Property, and insurance premiums. (Dkt. 56 at 5).

The court also takes judicial notice of the fact that, contrary to the Debtors' allegations, on May 11, 2009, OneWest Bank filed a proof of claim (the "Claim") in the Bankruptcy Case. The Claim appears as claim number 1 in the claims register for the Bankruptcy Case. Having taken judicial notice of the filing of the Claim, the court takes further notice that, contrary to the debtors' allegations, the Claim was filed on May 11, 2009, not May 8, 2009, and that OneWest Bank filed the Claim "fka IndyMac Federal Bank, FSB" and not "on behalf of" IndyMac Bank, FSB or any other entity.

ANALYSIS

The Law Applicable to A Motion For Judgment on the Pleadings

A judgment on the pleadings under Rule 12(c) "is properly granted when, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." Nelson v. City of Irvine, 143 F.3d 1196, 1200 (9th Cir.

1998). Although the caption of this motion indicates that it is a motion for a judgment on the pleadings pursuant to Rule 12(c), the motion and the prayer contained in the supporting memorandum of points and authorities requests dismissal of the FAC without leave to amend. However, pursuant to Fed. R. Civ. P. 12(h)(2), a motion made pursuant to Rule 12(c) may be used to raise a defense under Fed. R. Civ. P. 12(b)(6) that a complaint fails to state a claim upon which relief may be granted. In this case, the Defendants raised a defense under Rule 12(b)(6) as their first affirmative defense in their answer to the FAC filed on July 15, 2010 (Dkt. 92 at 17).

The following sets forth the legal standard for dismissal of a complaint where the complaint fails to state a claim on which relief may be granted:

> The purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable here under Fed. R. Bankr. P. 7012, is to test the legal sufficiency of a plaintiff's claims for relief. In determining whether a plaintiff has advanced potentially viable claims, the complaint is to be construed in a light most favorable to the plaintiff and its allegations taken as true. Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Church of Scientology of Cal. v. Flynn, 744 F.2d 694, 696 (9th Cir.1984). . .

Quad-Cities Constr., Inc. v. Advanta Bus. Servs. Corp. (In re Quad-Cities Constr., Inc.), 254 B.R. 459, 465 (Bankr. D. Idaho 2000).

In addition, under the Supreme Court's most recent formulation of Rule 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." Ashcroft v. Iqbal,129 S .Ct 1937, 1954 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. See Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955, 1964-66 (2007). ("[A] plaintiff's obligation to provide 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."). Factual allegations must be enough to raise a right to relief above the speculative level. Id., citing to 5 C. Wright & A. Miller, Fed. Practice and Procedure § 1216, at 235-36 (3d ed. 2004) ("[T]he pleading must contain something more. . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action").

In addition, the court notes the following:

> A dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. Navarro v. Block, 250 F.3d 729, 732 (9th Cir.

> 2001); Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir. 1988). . . the Court is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). Courts will not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003); accord W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Furthermore, courts will not assume that plaintiffs "can prove facts which [they have] not alleged, or that the defendants have violated . . . laws in ways that have not been alleged." Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526; 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983). . .

Toscano v. Ameriquest Mortg. Co., 2007 U.S. Dist. LEXIS 81884 (E.D. Cal. 2007).

A motion for judgment on the pleadings under Rule 12(c) is "essentially equivalent to a Rule 12(b)(6) motion to dismiss, so a district court may 'dispose of the motion by dismissal rather than judgment.'" Technology Licensing Corp. v. Technicolor USA, Inc., 2010 WL 4070208 (E.D. Cal. Oct. 18, 2010)(quoting Sprint

Telephony PCS, L.P. v. County of San Diego, 311 F.Supp.2d 898, 902-03 (S.D.Cal.2004)).

If a Fed. R. Civ. P. 12(b)(6) motion to dismiss is granted, "[the] court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc), quoting Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995). In other words, the court is not required to grant leave to amend when an amendment would be futile. See Toscano, 2007 U.S. Dist. LEXIS 81884 (citing Gompper v. VISX, Inc., 298 F.3d 893, 898 (9th Cir. 2002)). Similarly, a court may also grant leave to amend in response to a Rule 12(c) motion "if the pleadings can be cured by further factual enhancement." Technology Licensing Corp., 2010 WL 4070208 at *3.

Dismissal of Non-OneWest Bank Moving Defendants Without Leave to Amend

Before turning to an analysis of each of the enumerated claims for relief set forth in the FAC, the court first addresses the inclusion of named defendants IMB HoldCo, IMB Management, OneWest Group and OneWest Venture (collectively, the "Non-OneWest Bank Defendants") in the FAC, which parties were not named as defendants in the initial complaint filed on February 3, 2010. The FAC identifies the Non-OneWest Bank Defendants and alleges that each of the Non-OneWest Bank Defendants held an interest in

the loan at some time or provided loan servicing, but does not contain any specific allegations relating to conduct of the Non-OneWest Bank Defendants with respect to the Bankruptcy Case. Instead, considering the allegations in the FAC and the matters of which the court has taken judicial notice, of the Moving Defendants only OneWest Bank filed a proof of claim in this case.

To the extent that any conduct of the Non-OneWest Bank Defendants is alleged in the FAC at all, the Non-OneWest Bank Defendants are only vaguely and ambiguously identified with the label "Defendants," "Defendant" or "defendant." In light of the allegations in the FAC and those matter of which the court has taken judicial notice which indicate that OneWest Bank is the only named defendant which has actively sought to enforce a claim in this case, and which indicate that IndyMac Federal is the only named defendant which sent the debtors a post-petition notice regarding their mortgage payment, the Debtors' vague allegations are insufficient to state any plausible claim for relief against the Non-OneWest Bank Defendants.

Dismissal of Third Claim for Relief (Violation of 11 U.S.C. § 362(k)(1)) Without Leave to Amend

The Defendants' request for judgment on the pleadings with respect to the third claim for relief is denied, and the claim is dismissed without leave to amend as to all named defendants, but without prejudice to the inclusion of a claim for violation of the automatic stay in an amended complaint, as discussed, infra,

in connection with the second claim for relief.

The third claim for relief alleges a violation of 11 U.S.C. § 362(k)(1). Section 362(k)(1), however, does not create a right of action but governs the available remedies and measure of damages for a violation of a stay provided by § 362. As a result, because the Debtors cannot state a claim for a violation of § 362(k)(1), the claim is dismissed without leave to amend.

Dismissal of OneWest Bank With Leave to Amend

Having addressed the Debtors' allegations with respect to the Non-OneWest Bank Defendants, the court now addresses each of the Debtors' first, second, fourth and fifth claims for relief with respect to OneWest Bank.

1. First Claim for Relief: (Declaratory Relief)

This claim for relief is dismissed as to OneWest Bank with leave to amend.

The facts alleged by the Debtors establish the existence of a dispute between the Debtors and some, if not all, of the named defendants regarding the correct amount of the ongoing monthly payments to be made by the Debtors under her note and deed of trust obligations, the correct method by which the escrow analysis should be prepared, and the proper amount of the pre-petition claim based on the note and deed of trust obligation.

The first claim for relief fails, however, to distinguish adequately among the named defendants with respect to the

aforementioned disputes. The Debtors have not alleged facts supporting a need for declaratory relief between themselves and all of the named defendants, and, as a result, the defendants have not been given fair notice of the claims being alleged against each of them. See Erickson v. Pardus, 551 U.S. 89, 93 (2007)(under Fed. R. Civ. P. 8, the plaintiff need only provide a short and plain statement of the claim for relief, but must also give the defendant fair notice of the claims being alleged against it). The Debtors' allegations that a controversy exists between themselves and "Defendants" is insufficient. It appears, based on the Debtors' general allegations, that their claim for declaratory relief is relevant only to the Debtors and OneWest Bank, the only entity alleged to have taken an active role in enforcing the Claim in ths bankruptcy case. However, the Debtors are given leave to amend to clarify the exact nature of the dispute between themselves and each of the remaining named defendants, to the extent such a dispute exists.

2. Second Claim for Relief (Violation of 11 U.S.C. § 362(a))

This claim for relief is dismissed as to OneWest Bank with leave to amend.

The Moving Defendants argue that the facts alleged by the Debtors do not constitute a violation of the automatic stay of 11 U.S.C. § 362(a). The Moving Defendants point out that the FAC does not allege the sending of any post-petition notices under RESPA to the debtors, and that, at most, the Debtors are claiming

that the filing of an allegedly erroneous proof of claim constitutes a violation of the automatic stay.

The Moving Defendants rely heavily on the recent decision of the Ninth Circuit Bankruptcy Appellate Panel in In re Zotow, 432 B.R. 252 (9th Cir. BAP 2010). The facts underlying Zotow are similar to those alleged in the instant adversary proceeding. The Zotows were debtors in chapter 13 who objected to a proof of claim filed by BAC Home Loans Servicing, LP ("BAC"). The Zotows objected to BAC's claim on the ground that the Zotows' pre-petition escrow account shortages should have been listed in the proof of claim. Rather than include the shortage in the proof of claim, BAC had instead performed an escrow analysis and had sent the debtors and the chapter 13 trustee a post-petition notice which indicated an increase in their ongoing monthly installment payment into the escrow account due to the pre-petition shortage. The notice stated that it was being furnished for informational purposes only and should not be construed as an attempt to collect against the debtors personally. The notice also stated that if the debtors were involved in a chapter 13 proceeding the debtors were required to obey all orders of the court in the event that the amount specified in the notice conflicted with any order or requirement of the court. Based on the notice, the chapter 13 trustee made several ongoing post-petition installment payments to BAC from the debtors' plan payments based on the amount of the payments as specified in the notice. The chapter 13 trustee also objected to confirmation of the debtors' chapter

13 plan on the ground that the debtors' proposed plan payment was insufficient to fully fund the plan based on the increased payment amount set forth in the notice sent by BAC.

The debtors argued that BAC's attempt to collect the escrow shortage, a pre-petition debt, by increasing the ongoing post-petition installment payment through the chapter 13 plan rather than including the escrow shortage in the proof of claim constituted a violation of the automatic stay. Following an evidentiary hearing the bankruptcy court concluded that BAC should have included the pre-petition escrow shortage in its proof of claim, but also found that BAC had not violated the automatic stay.

The BAP affirmed the bankruptcy court's conclusion that BAC had not violated the automatic stay. As the BAP stated,

> the automatic stay does not prevent all communications between a creditor and the debtor. Morgan Guar. Trust Co. of N.Y. v. Am. Sav. and Loan Ass'n, 804 F.2d 1487, 1491 (9th Cir.1986); Connor v. Countrywide Bank, N.A. (In re Connor), 366 B.R. 133, 136 (Bankr.D.Hawaii 2007). Whether a communication is a permissible or prohibited one is a fact-driven inquiry which makes any bright line test unworkable. See Henry v. Assocs. Home Equity Servs., Inc., 272 B.R. 266, 278 (C.D.Cal.2002) (whether creditor's activities involved coercion or harassment is fact-specific inquiry); Cousins v. CitiFinancial Mortgage Co. (In re

Cousins), 404 B.R. 281, 287 (Bankr.S.D.Ohio 2009) (noting that determining whether a violation of the automatic stay occurs can be complicated).

Zotow, 432 B.R. at 258.

The BAP went on to identify prohibited communications as "those where direct or circumstantial evidence shows the creditors actions were geared toward collection of a pre-petition debt, were accompanied by coercion or harassment, or otherwise put pressure on the debtor to pay. . . . [M]ere requests for payment and statements simply providing information to a debtor are permissible communications that do no run afoul of the stay." Id. "In the end, one distinguishing factor between permissible and prohibited communications is evidence indicating harassment or coercion. When such evidence is present, a disclaimer on the communication that it was being sent 'for informational purposes only' is ineffective." Id. at 259. The BAP identified three significant facts in Zotow that informed its conclusion that the post-petition notice sent by BAC did not violate the automatic stay: (1) the notice was not in the nature of an invoice and merely set forth the fact of the debt; (2) BAC did not send the notice with a payment coupon or envelope and without any informational component; and (3) BAC sent only one notice to the debtors, and the information contained in that notice was information that the debtors would need to propose a feasible chapter 13 plan. Id. at 259-60. The Zotow court also found that

BAC did not violate the automatic stay by receiving increased post-petition payments from the chapter 13 trustee.

In the instant case, the Statement submitted by the Moving Defendants states in two places that it is not being used to collect a debt, but is for informational purposes only. It also states that IndyMac Federal, which sent the statement to the Debtors, calculated an anticipated escrow shortage of $5,849.63 by the end of April, 2009 if the Debtors did not plan to pay the increased monthly payment specified in the statement or pay the escrow shortage in a lump sum. The statement stated that IndyMac Federal "required" the escrow balance to be $1,028.05 by the end of Apri, 2009. The statement also states that if the Debtors wanted to pay the escrow shortage in a lump sum, they should return it to IndyMac Federal with the coupon attached to the Statement. As in Zotow, the Statement is not in the nature of an invoice. The Statement also states that it is for informational purposes only and is not being used to collect a debt, though it does state that IndyMac Federal "required" the Debtors' escrow account to have a certain balance by the end of April, 2009 and included a coupon to be returned with payment in the event that the debtors wished to pay the escrow shortage in a lump sum.

The question is whether the Debtors' allegation that the notice regarding a change in their payment is sufficient to elevate the alleged actions of one or more of the Moving Defendants to a violation of the automatic stay. The court concludes that the allegations contained in the FAC are not

sufficient. The court does not reach this conclusion because the sending of notices regarding post-petition payment increases can never be a violation of the automatic stay; the court does not foreclose the possibility that the sending of a notice to the debtor, whether informational or not, may rise to the level of coercion or harassment. As the Zotow court pointed out, whether communications are prohibited or permitted or whether they rise to the level of coercion or harassment are fact-driven inquiries for which there are not bright-line rules.

Instead, the court concludes that the allegations in the FAC and under the second claim for relief are not sufficient to state a claim upon which relief may be granted because, as with the first claim for relief, they do not give each of the Moving Defendants and the other named defendants fair notice of the claims being alleged against them. As with the first claim for relief, the general allegations in the FAC and in the second claim for relief are replete with vague references to "Defendants," "defendants" and "Defendant," with no apparent effort made to distinguish between each of the eleven defendants named in the caption of the FAC.

In addition, other than the sending of the Statement regarding a payment increase, the FAC is devoid of other allegations which, construed in the light most favorable to the Debtors, would show coercive or harassing behavior on the party of any of the Moving Defendants. As a result, the second claim for relief is dismissed with leave given to the Debtors to amend

the FAC to specify which of the named defendants committed acts which allegedly violated the automatic stay and, to the extent that they exist, to allege additional facts regarding the sending of the Notice or other acts committed in violation of the automatic stay.

3. Fourth Claim for Relief (Violation of Real Estate Settlement Practices Act (RESPA))

This claim is dismissed as to OneWest Bank with leave to amend.

The fourth claim for relief alleges that the "Defendants" violated RESPA by (1) failing to notify the Debtors when the note and deed of trust were transferred; (2) assessing more "risk" in the "Defendants'" escrow analysis calculations than is allowed by RESPA; (3) improperly accessing the escrow account for payment of property taxes and insurance; (4) failing to credit back charges for improperly force-placing insurance; and (5) performing an improper escrow analysis that resulted in incorrect notices of increase in payments. However, the Debtors cite only 12 U.S.C. § 2604 in connection with the claim. Section 2604, however, governs the form and distribution of special information booklets regarding the nature and costs of real estate settlement services.

In their written opposition, the Debtors have identified other sections of RESPA that they assert were violated by the Moving Defendants. These sections, however, are not identified

in the FAC. In the context of a motion for a more definite statement under Fed. R. Civ. P. 12(e), the Ninth Circuit has stated, "even though a complaint is not defective for failure to designate the statute or other provision of law violated, the judge may in his discretion . . . require such detail as may be appropriate in the particular case." McHenry v. Renne, 84 F.3d 1172, 1179 (9th Cir. 1996). Although the Moving Defendants have filed a motion for judgment on the pleadings rather than for a more definite statement, the court finds that McHenry v. Renne is applicable here, insofar as a motion for a more definite statement and a motion for judgment on the pleadings are both concerned with the sufficiency of the plaintiff's pleading. In this case, the court dismisses the fourth claim for relief with leave to amend as to the specific provisions of RESPA that the Debtors assert were violated by one or more of the named defendants because RESPA is a complex statute that covers several sections of Chapter 27 of the United States Code. Requiring the Debtors to specify the specific provisions that they believe were violated prevents both the Moving Defendants and the court from guessing which provisions of RESPA the Debtors believed the Moving Defendants violated and gives fair notice to all parties and the court of the claims being asserted.

The fourth claim for relief is also dismissed with leave to amend because, like the first and second claims for relief, it is replete with vague references to "Defendants" and "defendants" without any distinction between the eleven named defendants in

the caption of the FAC. The allegations underlying the fourth claim for relief do not give the remaining defendants fair notice of the claims being asserted against them. As a result, the fourth claim for relief is dismissed with leave given to the Debtors to amend the claim to specify which of the remaining named defendants violated RESPA and the specific manner in which they violated RESPA.

4. Fifth Claim for Relief (Civil Conspiracy)

This claim is dismissed as to OneWest Bank with leave to amend.

Civil conspiracy is not an independent tort. Instead it is "merely a mechanism for imposing vicarious liability; it is not itself a substantive basis for liability. Each member of the conspiracy becomes liable for all acts done by other pursuant to the conspiracy, and for all damages caused thereby." Favila v. Katten Muchin Rosenman LLP, 188 Cal.App.4th 189, 206 (2010). A civil conspiracy is "activated by the commission of an actual tort." Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal.4th 503, 511 (1994).

In addition, "[t]he basis of a civil conspiracy is the formation of a group of two or more persons who have agreed to a common plan or design to commit a tortious act. The conspiring defendants must also have actual knowledge that a tort is planned and concur in the tortious scheme with knowledge of its unlawful purpose. However, actual knowledge of the planned tort, without

more, is insufficient to serve as the basis for a conspiracy claim. Knowledge of the planned tort must be combined with intent to aid its commission." Id. (citing Kidron v. Movie Acquisition Corp., 40 Cal.App.4th 1571, 1582 (1995).

Here, the Debtors allege that "Defendants" engaged in a conspiracy for the purpose of "recouping pre-petition claims from post-petition estate property resulting in systematic injury to debtors" by means the allegedly improper escrow analyses described above, concealing the post-petition collection of pre-petition claims, and objecting to confirmation of chapter 13 plans based on the improper escrow analyses. These allegations, however, are not sufficient to state a claim that any of the named defendants were involved in a civil conspiracy. The Debtors have not alleged any agreement between any of the named defendants to a common plan or design to commit a tortious act, nor have they alleged that any of the named defendants had actual knowledge that a tort was planned and that they concurred in the tortious scheme with knowledge of its unlawful purpose. This claim for relief also suffers from the same defects as the first, second and fourth claims for relief in that it also fails to distinguish between any of the named defendants with respect to the alleged civil conspiracy. For these reasons, the court dismisses the fifth claim for relief as to OneWest Bank with leave to amend.

Rather than issue judgment in favor of OneWest Bank, the court dismisses the first, second, fourth and fifth claims for

relief in the FAC with leave to amend as to OneWest Bank because the court finds that it is possible that the deficiencies identified in the FAC may be cured with further factual enhancement. The court cautions the Debtors that the second amended complaint must clearly identify which of the remaining named defendants violated their legal rights and the specific manner in which they violated those rights; if the Debtors fail to do so those defendants who are not clearly connected with the acts complained of will be dismissed without leave to amend.

The court will issue a separate order consistent with this ruling.

Dated: JUL 14 2011

Thomas C. Holman
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

CERTIFICATE OF SERVICE

The undersigned deputy clerk in the office of the United States Bankruptcy Court for the Eastern District of California hereby certifies that a copy of the document to which this certificate is attached was served by mail to the following entities listed at the address(es) shown below.

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DATED: 7/15/11

By: Cathy E Guyer
Deputy Clerk **Cathy Guyer**